Filed 12/28/04 In re Travis T. CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re TRAVIS T., a Person Coming Under the Juvenile Court Law.	
HUMBOLDT COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. BRANDY T., Defendant and Appellant.	A106696 (Humboldt County Super. Ct. No. JV030093)

Brandy T. appeals from an order of the juvenile court terminating her parental rights to her son, two-year old Travis T. She raises only one issue on appeal: whether substantial evidence supports the court's determination under Welfare and Institutions Code section 366.26, subdivision (c)(1) that Travis is adoptable. We affirm because appellant waived the issue by failing to raise the issue below, and in any case there is ample substantial evidence to support the adoptability determination.

I. FACTS

Travis was born in November 2002. He was hospitalized in late April 2003, at the age of five months, for treatment of an upper respiratory infection. He was not making eye contact and was stiff when held, as if he was not used to being held or touched.

Appellant stayed with Travis overnight at the hospital, but was described by the nursing staff as withdrawn. She also did not follow suggestions for Travis' care, did not hold him very much, and did not seem to have much of a connection with him. Two days later appellant was arrested at the hospital on a charge of assault with a deadly weapon, for striking another woman with a flashlight. She was booked into jail and remained in custody. She had not made arrangements for Travis' care after his discharge from the hospital.

The matter was referred to respondent Humboldt County Department of Health and Human Services (Department), which filed a dependency petition on May 1, 2003, alleging that appellant had left Travis without any provision for support (Welf. & Inst. Code, § 300, subd. (g)), and that Travis was at risk of serious harm.[1] The juvenile court detained Travis on May 2, 2003. The court placed Travis in a foster care home.

On June 25, 2003, the juvenile court sustained a second amended dependency petition which alleged that appellant was failing to protect Travis (§ 300, subd. (b)) due to substance abuse; problems with anger management, including her arrest for a violent assault and a violent episode witnessed by a vocational assistant in late May; and her failure to provide Travis with proper medical care—Travis failed his hearing test at birth and appellant missed a follow-up appointment and did not reschedule. The juvenile court found by a preponderance of the evidence that Travis was a dependent child under section 300, subdivision (b). Travis remained in foster care.

Travis was still in foster care when the Department prepared its disposition report. That report states that "Travis is an 8 month old child who is at a developmental level appropriate for his age. He failed a hearing test that was administered at birth and [appellant] did not take him to follow up appointments to determine the extent of his hearing ability. Travis is currently being evaluated to determine if he has any hearing loss. He has no other known health issues."

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[1] Travis' father is married to another woman and expressed no interest in caring for or supporting Travis. He is not a party to this appeal.

Subsequent statutory references are to the Welfare and Institutions Code.

The juvenile court found by clear and convincing evidence that returning Travis to appellant's care would pose a substantial danger to his health, safety and well-being. The court continued Travis's placement in a foster home and ordered reunification services for appellant.

The Department's six-month status review report, prepared for a hearing on December 22, 2003, showed positive developments for Travis. He had completed a testing process for his hearing and "was found to have no identifiable hearing loss." The report does not refer to any current medical problems. Under the heading, "Developmental," the report states: "Travis is not a client of the Redwood Coast Regional Center. His physician, his foster parent and his social worker have observed no developmental delays."[2] The report also notes that "Travis is a happy and emotionally stable child. His physician, his foster parent and his social worker have observed no mental or emotional health problems."

According to the report, Travis had moved from his initial foster home placement to his current placement on December 1, 2003. He "continues to visit with his previous foster family as part of his transition process. Travis was moved so that he could be in a concurrent placement. He is adjusting well to his new home and his foster parents report that he slept soundly through his first night in their home. He is happy and playful in their home and the foster parents say that they are enjoying the process of getting to know him."

In contrast, appellant's whereabouts were unknown. She had been placed on probation for the assault charge, but on September 18, 2003 she had been arrested on a probation violation. The court released her to a drug treatment program, from which she absconded after a few days. There was currently a warrant out for her arrest. She had failed to comply with her reunification case plan.

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[2] According to the Department's brief, the Redwood Coast Regional Center aids "developmentally delayed persons."

Appellant had not seen Travis for three months. Travis, who was 13 months old, "has begun to bond with his current caregivers and they are eager to have him remain in their home as an adopted child."

Travis' court appointed special advocate (CASA) submitted a report recommending that "Travis stay with his concurrent adoptive family where he is very comfortable and well cared for." The CASA noted that Travis used to avoid eye contact, but now "has made a complete turn around." The CASA described Travis as "very happy," "friendly," "well adjusted," and as having a "wonderful" relationship with his foster mother. Other than an abnormal arching of his back, for which he was receiving treatment, "Travis is a generally healthy child." "All indications" were that placement with the adoptive family "will be a successful placement for Travis."

Following the Department's recommendations, the juvenile court terminated reunification services and set a permanency planning hearing pursuant to section 366.26 (.26 hearing) for May 11, 2004.

In its report prepared for the .26 hearing, the Department noted no special medical needs for Travis. The Department observed that "Travis is 18 months old and is on schedule developmentally. He is starting to talk and during a recent visit said 'touchdown' with the appropriate hand movements. He also says baby, mama, and dada. Travis is not a Regional Center client." Travis was "a generally happy child who enjoys attention, smiles easily and interacts with facial expressions." He had been with his current foster parents for about five and a half months.

The .26 report concludes that "Travis is getting his needs well met" in the home of the prospective adoptive parents, and "[i]t is likely Travis will be adopted if [appellant's] parental rights are terminated . . . ."

Attached to the .26 report was an adoption assessment prepared for the .26 hearing by the Adoption Services Bureau of the state Department of Social Services (Bureau). The Bureau determined that Travis was adoptable and recommended termination of appellant's parental rights. The Bureau noted his medical condition had "improved"

from his April 2003 hospitalization for a respiratory infection, and that he did not in fact have a hearing impairment. The Bureau noted no special medical needs.

The adoption assessment made positive comments about Travis' development and mental and emotional health: "Developmentally, Travis appears to be on target, if not ahead of the curve. Travis is adventurous and loves to climb anything and everything. He is a physically strong child who shows great agility. He actively explores his environment and the various ways in which he can use his body to obtain items out of reach or move objects from one place to another. Travis is particularly fond of the outdoors. His foster mother reports that he has a great sense of humor and has recently begun to dance and play dress up in an attempt to copy the activities of a dance class attended by an older child in the home."

"Travis's mental and emotional status appears to be greatly improved. . . . Since entering [foster] care Travis has made great progress in his mental and emotional health and no longer shows signs of stiffness or an aversion to eye contact. He seeks out his foster parents for comfort and reaches out to them when he wants to be held. Travis engages in extended eye contact with others and can interact well with adults and peers. . . . [¶] . . . [A] strong connection providing a sense of stability continues to develop with his current foster family."

The adoption assessment includes a section entitled, "Preliminary Assessment of Eligibility and Commitment of Prospective Adoptive Parents." The adoptive parents—who had been Travis' foster parents since December 1, 2003—"are very committed to [Travis] and have expressed a desire to adopt." The Bureau concluded "the family appears suitable for adoption of Travis." Both foster parents had been employed as biologists for the past 10 years, the father was 49, with 14 years of education; the mother was 48, with 18 years of education.

"The prospective adoptive parents appear to be demonstrating good parenting practices and demonstrate capability to meet the needs of Travis." They are familiar with the legal and financial rights and responsibilities regarding adoption, and are willing to accept those responsibilities.

The adoption assessment concluded: "Travis has a loving relationship with this family and would benefit from the establishment of a permanent parent/child relationship through adoption."

Travis's CASA submitted a second report, recommending that appellant's parental rights be terminated so Travis could be adopted by his current foster parents. The CASA stated that Travis was "very well cared for and loved" by the foster parents. The CASA noted "this has been a very successful placement for Travis." Travis is "a generally healthy child" other than "normal childhood illnesses."

At the .26 hearing, appellant testified briefly. She said she loved Travis and did not want to "lose him." She opposed adoption. If she had another chance, she would "do everything [she] possibly could for him." She wanted Travis "to be able to know his mom and his family, his real family." Appellant, who was represented by counsel, made no objection to the Department's recommendation, or to the court's finding, that Travis was likely to be adopted.

The juvenile court found "by clear and convincing evidence that [Travis] will be adopted . . . ." The juvenile court adopted the Department's recommendations, terminated appellant's parental rights, and ordered Travis placed for adoption.

II. DISCUSSION

Appellant contends the order terminating her parental rights to Travis must be reversed, because the court's finding of adoptability is not supported by substantial evidence. We affirm because (1) appellant has waived the issue, and (2) in any case substantial evidence supports the juvenile court's finding.

Appellant neither objected to the juvenile court's finding of adoptability nor raised the issue of adoptability at the .26 hearing. As such, she has waived the issue for purposes of appellate review. (See, e.g., *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1153 (*Lukas B.*); *In re Urayna L.* (1999) 75 Cal.App.4th 883, 886; *In re Aaron B.* (1996)

46 Cal.App.4th 843, 846.)[3] But we nevertheless consider the merits "if only to forestall any claim of ineffective assistance of counsel for failing to argue the issue. [Citation.]" (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1250 (*Melvin A.*).)

"In order for a juvenile court to terminate parental rights under section 366.26, the court must find by clear and convincing evidence that it is likely that the child will be adopted. [Citation.]" (*In re Asia L.* (2003) 107 Cal.App.4th 498, 509 (*Asia L.*); § 366.26, subd. (c)(1).) Whether there is clear and convincing evidence of adoptability is "[t]he sole issue" at the .26 hearing. (*In re David H.* (1995) 33 Cal.App.4th 368, 378 (*David H.*); see *In re Josue G.* (2003) 106 Cal.App.4th 725, 733 (*Josue G.*).) We review the termination order only "to determine whether the record contains substantial evidence from which a reasonable trier of fact could find clear and convincing evidence" that Travis was likely to be adopted. (*Asia L. supra,* at pp. 509-510; *Lukas B., supra,* 79 Cal.App.4th at p. 1154.)

On such a substantial evidence review, we must regard the evidence in the light most favorable to the prevailing party, and resolve conflicting evidence in favor of the termination order—giving full effect to the evidence of the prevailing party and disregarding the evidence, however strong it may be, of the losing party. (*In re J.I.* (2003) 108 Cal.App.4th 903, 911 (*In re J.I.*); *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) The substantial evidence standard applies even where the trial court's standard of proof is clear and convincing evidence, rather than preponderance: "The 'clear and convincing' standard is for the edification and guidance of the juvenile court. It is not a standard for appellate review. [Citation.]" (*In re J.I., supra,* at p. 911.)

" 'The issue of adoptability . . . focuses on the *minor*, e.g., whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor. [Citations.]' " (*In re Zeth S.* (2003) 31 Cal.4th 396, 406, quoting *In re*

[3] There is authority for not imposing the waiver rule when the Department has completely failed to muster proof of adoptability. (*In re Brian P.* (2002) 99 Cal.App.4th 616, 622-624.) That is not the case here.

Sarah M. (1994) 22 Cal.App.4th 1642, 1649 (*Sarah M.*); see *In re Erik P.* (2002) 104 Cal.App.4th 395, 400 (*Erik P.*).)

"Hence, it is not necessary that the minor already be in a potential adoptive home or that there be a proposed adoptive parent 'waiting in the wings.' " [Citations.] (*Sarah M., supra,* 22 Cal.App.4th at p. 1649; *David H., supra,* 33 Cal.App.4th at p. 378.) But the presence of a prospective adoptive family, while not determinative, is a factor in the adoptability analysis. "[A] prospective adoptive parent's willingness to adopt generally indicates"—because of the child's age, physical condition, mental and emotional state, etc.—that "the minor is likely to be adopted within a reasonable time by the prospective adoptive parent *or by some other family*." (*Sarah M., supra,* at p. 1650; see *Asia L. supra,* 107 Cal.App.4th at p. 510; *Erik P., supra,* 104 Cal.App.4th at p. 400.)

The question whether a child is adoptable "does not focus on the adoptive parents, but rather, on the child. [Citation.]" (*Josue G., supra,* 106 Cal.App.4th at p. 733.) Indeed, "the suitability of a potential adoptive family is irrelevant in a termination of parental rights hearing. [Citations.]" (*David H., supra,* 33 Cal.App.4th at p. 378; *accord, Sarah M., supra*, 22 Cal.App.4th at p. 1650; *In re Scott M.* (1993) 13 Cal.App.4th 839, 844.)

By a selective cherry picking of the evidence in the record, appellant contends "the evidence presented indicated that Travis was not generally adoptable . . . ." Viewing the record as a whole under the appropriate standard of review, we must disagree. The evidence showed that Travis was a generally healthy and happy child who was responding to proper care and attention and was adjusting wonderfully to the family environment of his foster, and prospective adoptive, parents. He is not, as appellant seems to suggest, a "special needs" child. Indeed, Travis appears so adoptable that a finding *against* adoptability might, on this record, be considered an abuse of discretion.

Appellant complains that the Department "failed to state that Travis was generally adoptable" and did not identify any other prospective adoptive families. Neither purported failure constitutes error. The evidence of adoptability speaks for itself, and we

know of no requirement that a multitude of potential adoptive families is a precursor of a finding of adoptability.

Appellant also argues that "[t]he Department's assertion that it was likely that Travis would be adopted . . . is not enough." But the adoptability finding is supported by substantial *evidence*, not the Department's position on adoptability.

Appellant further complains that the Department had not completed a home study of the prospective adoptive parents. Appellant seems to be confusing the more stringent requirements of adoption qualification with a general finding of adoptability. The focus is on Travis, not the foster family. We find substantial evidence that Travis is adoptable within a reasonable time—if not by the current foster parents, then by some other family.[4]

Finally, appellant argues the adoption assessment was insufficient. Section 366.21, subdivision (i)(4) requires that the assessment include "screening for criminal records and prior referrals for child abuse or neglect . . . ." The assessment in this case, while otherwise complete, does omit this information.

Appellant's opening brief is silent on the waiver issue—except here, on what may be appellant's strongest point on appeal. On this point appellant explicitly concedes she did not object below to the alleged insufficiency of the adoption assessment. Under the waiver principles we have set forth above, this issue has not been preserved for appeal.

In any case, we note the record strongly suggests, without apparent contradiction, that the prospective adoptive parents operate a licensed foster home. As such, the parents

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[4] The main case on which appellant relies, *In re Jerome D.* (2000) 84 Cal.App.4th 1200 (*Jerome D.*), is distinguishable. That case involved a prospective adoptive parent—the mother's ex-boyfriend—who apparently was not already a licensed foster parent. Also, the evidence apparently did not show general adoptability. (*Jerome D., supra,* at pp. 1203-1205.) And the court in *Jerome D.* seemed to overlook the point that the focus is not on the prospective parents, but on the child.

Appellant also refers us to *Melvin A.* for the claim that "since an approved home study is so difficult to obtain, at least one juvenile court has stayed the order terminating parental rights pending completion of the adoptive home study . . . ." What appellate counsel omits is that the *Melvin A.* court held that the stay was *error*. (*Melvin A., supra,* 82 Cal.App.4th at pp. 1247-1249.)

have already been screened for character, criminal history, and the willingness and ability to meet the needs of a child. (See *In re Diana G.* (1992) 10 Cal.App.4th 1468, 1481.) We see no error.

III. DISPOSITION

The order terminating parental rights is affirmed.

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Marchiano, P.J.

We concur:

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Stein, J.

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Margulies, J.